

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 121 of 2001

With

SCA No.4803 to 4839 of 2002, 725/2003, 1754/2003,
1778/03, 1902/03, 7256/04 to 7260/04, 7290/04 to
7294/04, 7339/04 to 7347/04, 7566/04 to 7571/04
7573/04, 7575/04, 7576/04, 7577/04, 7632/04, 7634/04
8042/04 to 8048/04, 8076/04, 8077/04, 4840/02 to
4857/02, 9436/04 to 9440/04, 9443/04, 9444/04,
9445/04 and 9447/04,

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

DID FRENCHISEES' ASSO. (GUJARAT)

Versus

CHIEF GENERAL MANAGER

Appearance:

MR SI NANAVATI, Senior Counsel with
MR NM KAPADIA for Petitioner
MR UI VYAS for Respondents No.1-4
Respondent No.5 served.

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 09/08/2004

ORAL JUDGEMENT

1.0 In all the above petitions the petitioners have challenged the Notification dated 9th November 1999 as also the Circular dated 23rd November 2000 issued by the Telecom Regulatory Authority of India and letter dated 2.1.2001 issued by the Deputy General Manager (C), which is at Annexure-J to the petition..

2.0 The relevant part of the Notification dated 9.11.1999 is reproduced as under:

Section I

Title, Extent and Commencement

1. Short title, extent and commencement:

(i) This Order shall be called
"Telecommunication Tariff (Tenth
Amendment) Order 2000".

(ii) The Order shall come into force with
effect from 1st December 2000.

Section II

Tariff

2. The tariff for franchised Group PBX or PABX
and EPABX with DID facility (for Multistorey,
other Buildings, Co-operative Housing Societies)
is changed as detailed below:

For item (16.b.ii) in Schedule I of the
Telecommunication Tariff Order (TTO), 1999
prescribing Monthly Rental, the changes are as
under:

Read in place of

"Rs.100 per month" "Rs.125 per month".

4. In (16.b.iv) in Schedule I of the
Telecommunication Tariff Officer (TTO), 1999
prescribing call charges, the existing entry is
replaced as under:

(a) Call charge per metered call unit up to
500 metered call units per month Rs.0.90.

(b) For calls above 500 metered call units
per month, call charge per metered call
unit Rs.1.10.

3.0 Mr. S.I. Nanavati, learned Senior Counsel for the petitioners has raised the following contentions to challenge the aforesaid Notification:

[i] The decision is arbitrary and in gross violation of the principles of natural justice inasmuch as before taking such decision, the petitioners were never heard.

[ii] The petitioners cannot approach the Tribunal as contemplated under the Act inasmuch as they were issued licence under section 4, subsection (2) of The Indian Telegraph Act, 1885 (the Act for short) and under the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the Act of 1997), the services provided includes only Government and the licensee, and the petitioners are not the licensees and therefore they will not be relegated to alternative remedy of section 14 of the Act of 1987.

[iii] The action of the respondents in reducing the charges from Rs.1.10 to Rs.0.90 is arbitrary, inasmuch as the petitioners will not get any commission from the respondent authority.

[iv] The petitioners have invested huge amount and because of the aforesaid notification they would incur loss which is violative of Article 19(1)(g) of the Constitution of India.

[v] That even as per the notification the Franchisees may be allowed to collect rent at Rs.125/- and they should pay 90ps for first 500 calls.

It is required to be noted that though the petitioners were called upon to produce the Licence Agreement, the same was not produced on record in some of the matters.

4.0 Mr. U.I. Vyas for the respondent authorities has vehemently opposed the aforesaid contentions. He submitted that reply has been filed in Special Civil Application No.121/2001 and the same may be treated as reply to all other petitions. The contentions of Mr. Vyas can be summarised as under:

[i] That as per section 15, subsection (5) of the Act of 1997, the orders and directions of the Authority shall be binding on the service providers, Government and all other persons concerned. Therefore, the petitioners cannot challenge the aforesaid decision, especially since the BSNL has accepted the same and the petitioners are only licensees through BSNL.

[ii] That the decision in question being a policy decision, this Court should not interfere since the decision taken is in the interest of the public at large and the consumers, which is the object of Telecom Regulatory Authority of India Act (TRAI).

[iii] That in a matter of contract, unless it has been shown that imposition of any condition is against the public policy or contrary to law, a writ petition cannot be entertained and therefore, these petitions deserve to be dismissed on that ground.

[iv] Mr. Vyas submitted that the respondent authorities will follow the Notification dated 9.11.1999 and Circular dated 23.11.1990 in their true spirit.

5.1.0 In the above context, it would be useful to refer to the statement of objects and reasons of the Telecom Regulatory Authority of India Act which reads as under:

"In the context of the National Telecom Policy, 1994 which, while stressing amongst others, on achieving universal service, seeks to bring the quality of telecom services to world standards, to provide for a wide range of services to meet customer's demand at reasonable prices and to provide for participation of companies registered in India in the area of basic as well as value added service, to make arrangement for the protection and promotion of consumer's interest and ensure fair competition, it was felt to separate the regulatory functions from the service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation, arising out of the opening of basic as well as value-added services in which private operators will be competing with the Government operations, there is a pressing need for an independent telecom regulatory body

for regulation of telecom services and the orderly and healthy growth of the telecommunications infrastructure besides the protection of interests of the consumers."

5.1.1 The reasoning given by the authority in the aforesaid notification reads as under:

"The Authority recalled the emphasis given in TTD, 1999 to DID franchisees as a means of expending tele-density in the context of enhanced rentals. The Authority further noted that the extension user of DID has an easier access to a DID Franchisee, than does a corresponding user of DEL to his service provider. Thus, the service is likely to be more user-friendly than the DEL. The Authority also noted that DID provides an option that requires less investment per user in comparison to a DEL. The Authority further noted that at the prevailing tariffs needed to change for the extension users of DID to find the service attractive in comparison to a DEL. Accordingly the tariffs for end-users of DID have been amended."

5.1.2 A perusal of the aforesaid reasoning shows that the decision of the authority is in consonance with the provisions of section 11 of the Act of 1997 and the same is made for the benefit of the consumer. If the decision of the authority is in consonance with the provisions of the Act and if such decision is taken keeping in mind the interest of the public at large, it cannot be challenged on the grounds raised by the petitioners.

6.0 The contentions raised on behalf of the petitioners are dealt with hereinafter.

6.1 It is true that the competent authority has taken a decision which is not challenged by the respondent herein since it was in the public interest and as per the contract between the petitioner and the BSNL which is produced in one of the petitions being SCA No.9437/04. As per condition no.27 the petitioners are bound to follow the revised terms. Condition no.27 reads as under:

"Telecom Authority may revise the terms and conditions at any time without any notice if it is necessary or expedient to do so in the interest of general public or for proper conduct of the direct dialling of EPABX service. The

licensee will be duly intimated of any such revision of terms and conditions."

In view of the above condition, there is no substance in the contention that no opportunity has been given to the petitioners. In fact as per the said condition the Authority can revise the terms and conditions at any time without any notice which will be binding on the franchisee. Since BSNL is bound by the Notification the Franchisee is also bound by the same. It is also required to be noted that in view of the term of the agreement it is very clear that in view of the change in the policy by the competent authority, the respondents will change the term of the agreement which will be binding to the parties.

6.2 Mr. Nanavati for the petitioners is justified in contending that the petitioners have approached this Court since they have no remedy under section 14 of the Act of 1997. Therefore the petitions are heard on merits as the same cannot be dismissed after a lapse of four years on the ground of other alternative remedy and also in view of the fact that they cannot approach the Tribunal since the licence is issued under section 4(2) of the Act.

6.3 Clause 4 of the Contract in respect of Charges to be levied from the Franchisee by DOT reads as under:

"4. On every outgoing junction, a commission of 20 paise per unit call upto 10,000 calls, 15 paise per unit call between 10,000 and 20,000 calls and 10 paise per unit call beyond 20,000 call made during the period of one month will be permitted to the franchisee."

Thus, the petitioners are entitled for 20 paise commission upto 10000 calls. The letter dated 2.1.2001 is not happily drafted, but it clarifies that in view of the Notification the franchisees are required to pay Rs.1.10 for first 500 calls, but adjustments can be made against 10000 calls and commission of franchisee will not be paid as per the contract. It is clear that while implementing the said decision the petitioners will not be entitled for 20 paise commission for first 500 calls as per the agreement and that is the intention of the respondent. Merely because the policy decision of the Government is not suitable to the petitioners, it cannot be construed that the said policy is illegal or arbitrary.

6.4 It is true that letter dated 2.1.2001 is not in consonance with the policy of TRAI, but the endeavour on the part of the local authority is to see that in view of the change of policy, they may not have to pay commission of 20 paise for 10000 calls. In that view of the matter, if at all the petitioners are aggrieved by that letter, they could have approached the authority for modification of the said condition.

6.5 As regards the contention that the petitioners have invested huge amount, as per the agreement and the terms and conditions which are produced at Annexure-A, it is clear that the petitioners are entitled to collect Rs.2500/- from each subscriber and therefore they are protected against their investment. Apart from that on preliminary installation they are entitled to collect Rs.800/-. Therefore the contention that the petitioners have suffered huge loss is misconceived. At the most it can be said that their profit has gone down, but that would not be a ground to quash the policy decision of the Government.

6.6 Mr. Kapadia has relied upon the policy decision produced at page 35. Para 8 of the said policy reads as under:

8. The positive benefits of such a course of action as estimated by the current DID GEPABX operations would be as follows:

a) On the Telecom Sector

An investment of Rs.1550 crores by small scale entrepreneurs.

10000 small exchanges will be installed all over India by 2004.

20 lac telephone lines will be commissioned by small entrepreneurs by 2004.

Revenue accrual of Rs.100 cr/m for DOT/MTNL with negligible expenditure.

Exponential growth of the Indian telecom sector.

Deep penetration of Internet and high speed data carrying capability.

Availability of affordable telephone connections.

Enormous improvement in efficiency and transparency.

b) On the Economy

Development of a knowledge based society from grass root upwards.

Employment for more than 5 lacs people.

Rapid progress of rural and backward areas.

Development of indigenous technology.

Major contribution to GDP.

Growth of research and development facilities in telecom.

c) On DOT/MTNL

Savings on Investment, switches, cable, manpower, stationary, billing and operational cost.

Immense growth in revenue earning.

Availability of high speed data and multimedia capability including ISDN in small towns with about 1 lac population by 2002.

Growth of professionalised and international quality of telecom service."

6.6.1 A perusal of the aforesaid benefits clearly show that one of the objects is also to give employment to more than 5 lacs people. Thus, while adopting this policy the Government has taken into consideration the employment opportunities and other developmental aspects and even on this ground no infirmity can be found in the decision of the respondent authorities. Apart from that the decision in question is meant for small consumers. This being a national level policy decision, majority of the Franchisees have accepted the same. Only a fraction

of such class has challenged the same which indicates that majority of them has accepted the decision which being rational.

6.6.2 Learned counsel for the petitioner has pointed out a decision of the Bombay High Court dated 21st October 2002 passed in Writ Petition No.2132/2002, the relevant part of which reads as under:

"During the course of motion hearing, the learned counsel for the respondent Mahanagar Telephone Nigam Ltd. made a categorical statement that petitioner is being charged for the calls as per DOTs guidelines and the notification. In that event, the petitioner should not have any grievance since petitioner's claim in the writ petition is that as per notification dated 9th November 2000, the call charge per metered call unit upto 500 metered call units per month should only be at the rate of 90 ps and for the calls over and above 500 calls per month, the call charges should be at the rate of Rs.1.10. This is what is accepted by the learned counsel for respondent-MTNL.

3. In view thereof, no further order needs to be passed in the writ petition and it is disposed of accordingly."

The review petition filed in the aforesaid matter has also been rejected. Mr.Nanavati, therefore, submitted that the very same principle is applicable for the petitioners herein.

7.1 Mr. Vyas for the respondents relied upon a decision of the Supreme Court in the case of M/s Shri Sitaram Sugar Co. Ltd. Vs. Union of India, reported in AIR 1990 SC 1277. He relied upon paragraphs 47 and 58 of the said decision which read as under:

"47. Judicial review is not concerned with matters of economic policy. The Court does not substitute its judgement for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In

all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J. in *Gupta Sugar Works* (AIR 1987 SC 2351 at p.2352) (supra).

"the court does not act like a chartered accountant nor acts like an income tax officer. The court is not concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination."

58. Price fixation is not within the province of the courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in *Mississippi Valley Barge Line Company Vs. United States of America* (1933) 292 US 282-290: 78 Law ed 1260, 1265.

"The structure of a rate schedule calls for a peculiar measure for the use that enlightened judgement which the Commission by training and experience is qualified to form It is not the province of a court to absorb this function to itself ... The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body."

7.1.1 Mr. Vyas, therefore, submitted that it is a matter of policy and planning for the Government to adopt a particular policy and therefore this Court would not interfere in such policy decisions. In my view, this Court has very limited jurisdiction in such policy matters. Apart from that, since the decision is taken to achieve the object of the Act, this Court will not disturb the same.

7.2 Mr. Vyas next relied upon a decision in the case of *U.P. Financial Corporation and Ors. Vs. Naini Oxygen & Acetylene Gas Ltd.*, reported in (1995) 2 SCC 754. Para 21 of the said decision reads as under:

"21. However, we cannot lose sight of the fact

that the Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. As such, in the discharge of its functions, it is free to act according to its own light. The views it forms and the decisions it takes are on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. Unless its action is malafide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however more prudent, commercial or businesslike it may be, for the decision of the Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable."

7.2.1 In the present case, the expert body has given reasons which are in consonance with the provisions of the Act and also the reasons and objects of the Act. Therefore, this Court would not be justified in disturbing such decision.

7.3 Mr. Vyas, next relied upon a decision in the case of BALCO Employees Union (Regd.) Vs. Union of India, reported in 2001 AIR SC 5135 wherein it is held that the policy decision is in respect of economic matters and such decision cannot be interfered with unless policy is contrary to the Act or Constitution. Mr. Vyas relied upon paragraph 46 which reads as under:

"46. Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCAO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers

may have interest in the matter in which the Company is conducting its business, inasmuch as its policy decision may have an impact on the workers' rights, nevertheless it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law. Even a government servant having the protection of not only Articles 14 and 16 of the Constitution, but also of Article 311, has no absolute right to remain in service. For example, apart from cases of disciplinary action, the services of government servants can be terminated if posts are abolished. If such employee cannot make a grievance based on Part III of the Constitution or Article 311 then it cannot stand to reason that like the petitioners, non-government employees working in a company which by reason of judicial pronouncement may be regarded as a State for the purpose of Part III of the Constitution, can claim the superior or a better right than a Government servant and impugn its change of status. In taking of a policy decision in economic matters at length, the principles of natural justice have no role to play. While it is expected of a responsible employer to take all aspects into consideration including welfare of the labour before taking any policy decision that, by itself, will not entitle the employees to demand a right of hearing or consultation prior to the taking of the decision."

"96. judicial interference by way of PIL is available if there is injury to public because of dereliction of Constitutional or statutory obligations on the part of the Government. Here it is not so and in the sphere of economic policy or reform the Court is not the appropriate forum. Every matter of public interest or curiosity cannot be the subject matter of PIL. Courts are not intended to and nor should they conduct the administration of the country. Courts will interfere only if there is a clear violation of Constitutional or statutory provisions or non-compliance by the State with its constitutional or statutory duties. None of these contingencies arise in this present case."

7.3.1 On the facts of the present case, it may be that the percentage of the profit of the petitioners might have gone down, but on the whole the consumers are benefited which is a policy decision of the Government.

Therefore, that cannot be a ground for interference with the impugned decision.

7.4 Mr. Vyas next relied upon a decision of the Supreme Court in the case of Orissa State Financial Corporation Vs. Aarsingh Ch. Nayak, reported in (2003) 10 SCC 261. Paragraph 6 of the said decision reads as under:

"On a plain reading of the impugned order it is manifest that the High Court while considering the writ petition filed by the owner of the vehicle for quashing of the notice of auction-sale and for other consequential reliefs has passed order drawing up a fresh contract between the parties and has issued certain further directions in the matter; the Corporation has been directed to advance a fresh loan to the writ petitioner to enable him to purchase a new truck; to enter into agreement for realization of the balance loan amount in accordance with law; to write off the remaining amount of Rs.16,500 and to order waiving of the interest till date etc. The order, to say the least, was beyond the scope of the writ petition which was being considered by the High Court and beyond the jurisdiction of the Court in a contractual matter. No doubt, while exercising its extraordinary jurisdiction under Article 226 of the Constitution, the High Court has wide power to pass appropriate orders and issue proper directions as necessary in the facts and circumstances of the case and in the interest of justice. But that is not to say that the High Court can ignore the scope of the writ petition and nature of the dispute and enter the field pertaining to contractual obligations between the parties and issue such directions annulling the existing contract and introducing a fresh contract in its place."

7.4.1 The ratio laid down in the above decision will squarely apply to the facts of the present case and any interference in the matter would amount to change in the policy or condition of contract which cannot be done unless it is arbitrary or violative of any fundamental or statutory rights or against the public policy. Learned Counsel for the petitioners is unable to point out any such infirmity in the decision in question.

8.1 After having heard the learned counsel for the

respective parties and perused the relevant record, I am of the opinion that the authority has taken all aspects into consideration including welfare of the public before taking the policy decision and therefore, merely because the decision is not partly favourable to the petitioners, it cannot be said that they should be consulted prior to the taking of the decision which is not feasible in the decision making process.

9.2 Looking to the aforesaid reasoning shows that the decision of the authority is in consonance with the provisions of section 11 of the Act of 1997 and the same is made for the benefit of the consumer. If the decision of the authority is in consonance with the provisions of the Act and if such decision is taken keeping in mind the interest of the public at large and object of the Act, no grievance can be made against the said decision.

8.3 Learned counsel for the petitioners is unable to point out that the decision is against the provisions of the Act or it is against the interest of the public at large. In that view of the matter, this Court cannot exercise the extraordinary jurisdiction under Article 226 of the Constitution of India. Apart from that the decision in question is a policy decision taken in the interest of the public at large and therefore also, it would not be appropriate for this Court to interfere with such policy decision merely because such decision is not suitable to a small section of the public.

8.4 From the facts of the case it is clear that the parties are bound by the terms of the contract and if at all there is any breach of the term of contract the proper remedy for the petitioners is to file appropriate proceedings before the civil court for redressal of their grievances if at all there is any breach of contract.

9.0 In view of the aforesaid discussion, I do not find any substance in the contention the petitioners have no remedy under section 14 of the Act of 1997. Merely on that ground the petitioners cannot invoke jurisdiction of this Court under Article 226 of the Constitution of India, especially when the decision is a policy decision taken by the appropriate competent authority within its power and jurisdiction and the decision is to achieve the object of the Act.

9.1 When a competent authority constituted under the Act has taken a decision and which has been accepted by the licensee viz. the respondents, sub-licensee cannot challenge the same merely on the basis that such decision

is not favourable to petitioners. The petitioners have not pointed out that the decision of revising the charges is arbitrary or against the public interest. Therefore, it is clear that the petitioners are bound by the terms and conditions imposed in the said notification and the petitioners cannot charge more than Rs.0.90ps upto 500 metered call units per month and Rs.1.10 for calls above 500 metered call units per month.

9.2 A perusal of the decision clearly shows that the decision is taken with a view to attract more consumers and certainly the benefits go to such consumers at large. Apart from that the BSNL will not pay 20 paise commission to the licensee, but that will be adjusted against the rent of Rs.100/- and overhead expenses can be adjusted from Rs.25/-. Thus, when the expert body has taken a decision keeping in mind the consumers at large, this Court will not substitute its decision inasmuch as this Court is not sitting in appeal over the decision of the Expert Committee.

10.1 It is also required to be noted that the petitioners were entitled for 20 paise commission for first 10000 calls, and in view of this, BSNL will not be in a position to pay any commission for 10000 calls since they will not be collecting the same as per TRAI Notification. In light of the above discussion, the terms may be modified by the respondents.

10.2 In the premises aforesaid, I do not find any substance in the contentions raised on behalf of the petitioners. The petition are, therefore, rejected. Rule/Notice, wherever issued, are discharged with no order as to costs. Interim relief, if any, stands vacated. However, it is observed that the respondents will implement the decision of TRAI in its true spirit and will not pay any commission to the petitioners for the first 500 calls per extension and commission will be paid after adjusting this in the bill. In view of the above discussion, the respondent authorities may reconsider the letter dated 2nd January 2001.

10.3 At this stage Mr. Nanavati has requested to continue the interim relief granted in the petition. However, as stated hereinabove, the authorities are duty bound to implement the decision of the respondent no.5 and this Court cannot sit in appeal over the decision of the expert committee, I do not see any reason to extend the interim relief granted earlier especially when the matter involves public money. The request is therefore rejected.

[K.S. JHAVERI, J.]

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